

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, DIVISION OF  
ELECTIONS, and GAIL FENUMIAI,  
DIRECTOR, STATE OF ALASKA,  
DIVISION OF ELECTIONS,

Appellants,

v.

RECALL DUNLEAVY, an  
unincorporated association,

Appellee.

Case No. S-17706

Superior Court No.: 3AN-19-10903CI

**MOTION FOR ATTORNEYS' FEES**

**I. INTRODUCTION**

Appellee Recall Dunleavy moves for an award of full reasonable attorneys' fees on appeal, to be paid by the State of Alaska, pursuant to AS 09.60.010. Recall Dunleavy is the prevailing party on a constitutional claim. Its full reasonable attorneys' fees on appeal were \$139,133.00. This motion is supported by the accompanying exhibits and Affidavit of Jahna M. Lindemuth.<sup>1</sup>

Recall Dunleavy brings this motion now, with this Court's full decision still pending, so that Recall Dunleavy may be paid by the State under this year's appropriation for judgments entered before June 30, 2021.<sup>2</sup> If attorneys' fees are awarded after that date, Recall Dunleavy likely will have to wait another year for payment.

<sup>1</sup> See generally Affidavit of Jahna M. Lindemuth (Apr. 23, 2021) [hereinafter Lindemuth Aff.].

<sup>2</sup> Lindemuth Aff. at ¶¶ 12-13.

## II. FACTUAL AND PROCEDURAL BACKGROUND

This appeal involved the State Appellants' challenge to the superior court's final decision declaring that the State erred as a matter of law in refusing to certify four of the five grounds stated in the application for a petition to recall Governor Dunleavy, and that the refusal to certify the application denied Alaskans the rights conferred by article XI, section 8 of the Alaska Constitution.<sup>3</sup> [See Exc. 286-303]

Immediately after the State filed its notice of appeal, Recall Dunleavy moved for expedited briefing and decision.<sup>4</sup> The scheduling motion was intertwined with Recall Dunleavy's request to lift the stay that the superior court had granted at the request of the Intervenor.<sup>5</sup> Before this Court, the State did not oppose continuing the stay and argued that Recall Dunleavy would not be harmed if the stay remained in place.<sup>6</sup>

After briefing, this Court lifted the stay and set an expedited briefing schedule.<sup>7</sup> The State filed its Appellants' Brief on February 25, 2020; Recall Dunleavy filed its appellee brief on March 9; and this Court held oral argument on March 25, 2020. Following the argument, this Court ordered expedited supplemental briefing from both parties (simultaneous opening briefs and simultaneous replies) on issues of first

---

<sup>3</sup> See Alaska Const. art. XI, § 8 ("All elected public officials in the State . . . are subject to recall by the voters of the State . . .").

<sup>4</sup> Appellee's Motion to Lift Stay Pending Appeal (Feb. 3, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> State Appellants' Response to Appellee's Motion to Lift the Stay and for a Briefing Schedule (Feb. 7, 2020).

<sup>7</sup> Order: Motion to Lift Stay Pending Appeal (Feb. 14, 2020); Opening Notice, Briefing Schedule, Notice of Oral Argument (Feb. 14, 2020).

impression in this state.<sup>8</sup> After receiving the briefing, on May 8, 2020, this Court issued an order disposing of the appeal by affirming the superior court's decision.<sup>9</sup> This Court stated that "[a] full opinion explaining this order will follow."<sup>10</sup> This Court has not yet issued its full opinion.

Based on the May 8, 2020 order affirming the superior court's decision, Recall Dunleavy moved for full attorneys' fees in the superior court.<sup>11</sup> In response to the State's opposition, Recall Dunleavy modified its request in minor ways, and the superior court awarded Recall Dunleavy the full amount sought in the modified request.<sup>12</sup> The superior court specifically found that Recall Dunleavy had "no economic incentive to pursue the litigation,"<sup>13</sup> and that the overall requested amount of fees was reasonable given the complex issues of first impression, the attorneys' discounted rates, and the experience of the attorneys involved.<sup>14</sup> The State did not appeal the superior court's award of attorneys' fees and costs to Recall Dunleavy.

---

<sup>8</sup> Order: File Supplemental Briefs, No. S-17706 (Apr. 2, 2020).

<sup>9</sup> Order: Disposition of Appeal (May 8, 2020) [hereinafter Disposition of Appeal].

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *See generally* Plaintiffs' Motion for Attorneys' Fees, 3AN-19-10903CI (June 17, 2020).

<sup>12</sup> Order on Motion for Attorney's Fees, 3AN-19-10903CI, at 9 (Alaska Super. Oct. 8, 2020) (Exhibit 3 to Lindemuth Aff.) [hereinafter Exhibit 3].

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 8-9.

### III. ARGUMENT

Appellate Rule 508(e)(1) directs this Court to award fees when a fee award is provided by statute. AS 09.60.010 governs the award of attorneys' fees in a case raising constitutional questions.<sup>15</sup> The statute provides:

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right . . . .<sup>16</sup>

The statute contains three exceptions, none of which applies here.

Accordingly, Recall Dunleavy should be awarded its full reasonable appellate attorneys' fees as a prevailing constitutional litigant in this case.<sup>17</sup>

#### A. Recall Dunleavy prevailed on a constitutional claim.

This litigation concerned a single constitutional question: whether the State improperly denied certification of Recall Dunleavy's recall application in violation of article XI, section 8 of the Alaska Constitution.<sup>18</sup> [See Exc. 286-303] Recall Dunleavy

---

<sup>15</sup> See *Meyer v. Stand for Salmon*, 450 P.3d 689, 690 (Alaska 2019) (citing AS 09.60.010(c)).

<sup>16</sup> AS 09.60.010(c).

<sup>17</sup> For simplicity sake, Recall Dunleavy is not seeking to recover its costs under AS 09.60.010 in this motion. Recall Dunleavy will instead submit a separate cost bill under Appellate Rule 508(d).

<sup>18</sup> Disposition of Appeal at 1-2; see also *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 479 (Alaska 2020) ("[T]he people have the constitutional right to petition to recall elected officials." (citing Alaska Const. art. XI, § 8)).

prevailed when this Court affirmed the superior court's decision which granted summary judgment to Recall Dunleavy as to four of the five grounds in the recall application, certified an amended recall application, and ordered the State to prepare and issue recall petitions.<sup>19</sup> [See Exc. 303]

**B. Recall Dunleavy lacked sufficient economic incentive to bring this claim.**

This Court has explained that “sufficient economic incentive” exists only when “a claim . . . is brought primarily to advance the litigant’s *direct economic interest*.”<sup>20</sup> To determine whether a claimant has a “direct economic interest,” this Court “generally examine[s] two factors”: (1) “the nature of the claim and relief sought” and (2) “the direct economic interest at stake.”<sup>21</sup>

Recall Dunleavy easily satisfies both of these tests. The superior court appropriately found that Recall Dunleavy lacked sufficient economic incentive to bring the suit, a fact-finding that the State did not appeal.<sup>22</sup> The same analysis applies to the appellate litigation. Recall Dunleavy sought injunctive relief only, not damages. Its sole purpose for bringing this lawsuit was to protect the people’s constitutional right to seek

---

<sup>19</sup> Disposition of Appeal at 2 (“IT IS ORDERED that the conclusions of the superior court’s January 14, 2020 order that are challenged in this appeal are AFFIRMED.”).

<sup>20</sup> *Alaska Conservation Found. v. Pebble Ltd. P’ship*, 350 P.3d 273, 281-82 (Alaska 2015) (emphasis added); see also *Alaska Miners Ass’n v. Holman*, 397 P.3d 312, 317 (Alaska 2017) (“We reiterate and emphasize—again—that *direct* economic benefit is needed for there to be ‘sufficient economic incentive to bring the action.’ ” (italics in original) (quoting AS 09.60.010)).

<sup>21</sup> *Alaska Conservation Found.*, 350 P.3d at 282.

<sup>22</sup> Exhibit 3 at 8 to Lindemuth Aff.

recall of the governor. Neither Recall Dunleavy as an organization, nor anyone associated with it, will receive any direct economic benefit from prevailing in this case.<sup>23</sup> In comparable cases, this Court repeatedly has determined that an organization advancing constitutional claims had no direct economic interest.<sup>24</sup>

**C. Recall Dunleavy's requested attorneys' fees are reasonable.**

Appellee Recall Dunleavy requests an award of attorneys' fees of \$139,133.00 for litigation before this Court. The fees requested, while not insubstantial, are reasonable in this case. The accompanying affidavit of counsel, and its attached exhibits, explains Recall Dunleavy's request in greater detail.<sup>25</sup>

Reasonableness is a function of both the attorneys' hourly rates and the number of hours.<sup>26</sup> All of the attorneys in this case reduced their rates below what they normally

---

<sup>23</sup> *Alaska Conservation Found.*, 350 P.3d at 281-82.

<sup>24</sup> See, e.g., *Dep't of Health & Soc. Servs. v. Planned Parenthood of the Great Nw.*, 448 P.3d 261, 262-65 (Alaska 2019) (Winfrey, J., concurring) (explaining how Planned Parenthood did not have "sufficient economic incentive" that to preclude recovery of full reasonable attorneys' fees under AS 09.60.010); *Alaska Conservation Found.*, 350 P.3d at 286 (concluding a primary purpose of "securing changes to and increasing notice and public involvement in the State's mineral exploration permitting process" did not show a sufficient economic incentive); *Gwich'in Steering Comm. v. State, Office of the Governor*, 10 P.3d 572, 585 (Alaska 2000) (holding there was not a sufficient economic incentive to litigate because claimants only "sought access to information, not money or other economic advantage"); *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1193 (Alaska 1995) (excluding "potential economic benefit" from the analysis); *McCormick v. Smith*, 799 P.2d 287, 288 (Alaska 1990) (determining that seeking to enjoin a recall election did not implicate a sufficient economic incentive to bar the recovery of full reasonable attorneys' fees and costs).

<sup>25</sup> See generally *Lindemuth Aff.*

<sup>26</sup> See *Nautilus Marine Enters., Inc. v. Exxon Mobil Corp.*, 332 P.3d 554, 560-62 (Alaska 2014).

charge. The fees requested in this motion are based on hourly rates of \$200 to \$285 per hour, which are well below the prevailing rates in Anchorage for attorneys of comparable experience.<sup>27</sup> In the superior court, the State did not dispute the reasonableness of the rates.

The fact that multiple lawyers were involved is reasonable in this case. This appeal took place on an extremely expedited basis; it involved important issues of first impression in this state; and it centered on legal questions with broad constitutional and political implications to all Alaskans. It would have been difficult for just one or two attorneys to manage this complex case effectively in the time allowed, particularly since private attorneys are rarely able to devote nearly full-time to a single case.<sup>28</sup>

The total number of hours is reasonable. Throughout the appeal, the team of attorneys made conscientious efforts to work efficiently and avoid unnecessary duplication of effort.<sup>29</sup> The time required for this appeal was substantially greater than in the typical case, because this Court ordered Recall Dunleavy to prepare two additional briefs.<sup>30</sup> Further, substantial non-routine motion work was required at the start of this appeal to establish an expedited schedule and to obtain relief from the stay the superior

---

<sup>27</sup> Lindemuth Aff. at ¶ 7.

<sup>28</sup> See *Nautilus*, 332 P.3d at 561 (holding the superior court did not abuse its discretion by determining that fifteen attorneys billing for a case “was not unreasonable”).

<sup>29</sup> See Lindemuth Aff. at ¶ 9.

<sup>30</sup> Supplemental Brief of Appellee (Apr. 13, 2020); Supplemental Reply Brief of Appellee (Apr. 20, 2020).

court had granted.<sup>31</sup> Finally, as part of preparing this motion, Recall Dunleavy’s attorneys reviewed the billing records and exercised judgment to eliminate hours that were not directly related to the appellate litigation.<sup>32</sup>

As described in the Lindemuth Affidavit, Ms. Lindemuth and Ms. Orlansky — two of the most experienced attorneys on constitutional issues in the state — took the lead in drafting the various briefs, dividing work by issue between them. Both have done more than thirty appeals to the Alaska Supreme Court. Mr. Gottstein, a fifth-year associate who clerked for this Court, provided much of the basic research at his lower billing rate, and did technical edits of all of the briefs. Finally, Mr. Kendall, who has expertise in election law, and Mr. Feldman, one of the state’s leading constitutional experts, helped with strategy and editing of the various arguments.<sup>33</sup>

The State may claim that the number of hours is unreasonable based on the lower number of hours the Department of Law spent on the case. But this Court has made clear that even a large discrepancy between fees incurred by each side does not establish that one side’s fees were unreasonable.<sup>34</sup> Given the fiscal constraints on the State, it is not

---

<sup>31</sup> Emergency Motion to Expedite Request for Scheduling Conference and Motion to Lift Stay (Feb. 3, 2020).

<sup>32</sup> Lindemuth Aff. at ¶ 5.

<sup>33</sup> *Id.* at ¶ 9.

<sup>34</sup> See *Nautilus*, 332 P.3d at 560-61 (“The burdens assumed by opposite sides of litigation are not necessarily equal, and it is a judgment call as to whether such a discrepancy reflects over-preparation and over-billing by one set of attorneys, or under-preparation and under-billing by the other set of attorneys.”) (*quoting Gamble v. Northshore P’ship*, 28 P.3d 286, 290 (Alaska 2001)).

surprising that staffing at the Department was lean and aimed at efficiency. *Nautilus* establishes that this Court should not find the total hours requested excessive, unless review of the file reflects that work was clearly unnecessary.<sup>35</sup> The superior court found that Recall Dunleavy's request for attorneys' fees in superior court was reasonable, where the Recall Dunleavy attorneys used the same approach to divide the labor and review each other's work to assure efficient and high-quality briefing. The State did not appeal the superior court's determination.

This Court should find that the total fees requested, considering both the rates and the number of hours, were reasonably incurred, and that Recall Dunleavy has therefore established that it is entitled to an award of reasonable attorneys' fees totaling \$139,133.00.

## V. CONCLUSION

Appellee Recall Dunleavy is a prevailing constitutional claimant, and had no sufficient economic incentive to bring this lawsuit. Its request to recover attorneys' fees totaling \$139,133.00 is reasonable. This Court therefore should grant this motion and award Recall Dunleavy \$139,133.00 to be paid by the State Appellants in accordance with AS 09.60.010.

---

<sup>35</sup> *Id.* at 561 (affirming fee award based on superior court's findings that "Exxon's attorneys 'produced high quality products and were always prepared for hearings and at trial.' It observed that this was 'not the more economical or frugal style of litigation, but a well-funded effort' that led to success, and that '[i]t is hard to determine after the fact what contributed to the success and what might not have mattered.' ").

DATED this 23 day of April 2021, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, PC

By: 

Janna M. Lindemuth  
Alaska Bar No. 9711068  
Scott M. Kendall  
Alaska Bar No. 0405019  
Samuel G. Gottstein  
Alaska Bar No. 1511099

SUMMIT LAW GROUP

Jeffrey M. Feldman  
Alaska Bar No. 7605029

REEVES AMODIO LLC

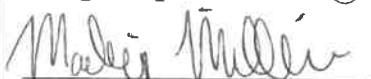
Susan Orlansky  
Alaska Bar No. 8106042

**CERTIFICATE OF SERVICE AND TYPEFACE**

I hereby certify, pursuant to App. R. 513.5,  
that this Motion for Attorney Fees was  
prepared in 13 point proportionally spaced  
Times New Roman typeface.

Further, I hereby certify that on this 23<sup>rd</sup> day  
of April 2021, a true and correct copy  
of the foregoing was sent to the following  
via U.S. Mail and Email:

Margaret Paton-Walsh  
Attorney General's Office  
1031 W. 4th Avenue, Suite 200  
Anchorage, AK 99501  
margaret.paton-walsh@alaska.gov



Mackenzie Milliken